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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 501

CITY OF DUBUQUE BRIDGE COMMISSION,
Petitioner,

vs.

THE BOARD OF REVIEW FOR THE CITY OF DUBUQUE, JULIEN TOWNSHIP, DUBUQUE COUNTY, IOWA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA AND BRIEF IN SUPPORT THEREOF.

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THE BOARD OF REVIEW FOR THE CITY OF DUBUQUE, JULIEN TOWNSHIP, DUBUQUE COUNTY, IOWA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, City of Dubuque Bridge Commission, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Iowa entered in the above case on August 11, 1942 (5 N. W. (2) 334, R. 88-107), affirming judgment and decree of the District Court of Iowa, in and for Dubuque County, dated January 29, 1942, and by their counsel petitioner respectfully shows:

Summary Statement of Matter Involved.

City of Dubuque Bridge Commission, a public body corporate and politic, (R. 23) is duly organized and existing

under an Act of Congress (Public—189—76th Congress, Chapter 318, First Session S. 955 Approved July 18, 1939) (R. 13). (Act of Congress July 18, 1939, Sections 1-15, 53 Statutes 1051-1057.) The Commission is a non-stock, non-profit corporation, whose funds must be devoted exclusively to the purpose of the Act, with the compensation of its members strictly defined and limited by law (R. 23). "To facilitate interstate commerce, improve the postal service and provide for military and other purposes" Congress authorized the Commission to purchase, construct, maintain and operate a bridge or bridges across the Mississippi River between Dubuque, Iowa, and East Dubuque, Illinois, and to finance the cost of the same by the issuance of bonds, to be paid from tolls collected on said bridge or bridges (R. 13-15). It also provides that when the bonds are retired the Commission shall convey the bridge or bridges to the respective states or their subdivisions in which the bridge or bridges are located, or to other interests, but on condition that the same shall thereafter be operated free of toll. If said states, or other interests, do not accept the same the Commission shall operate the same free of toll (R. 20-22).

Acting under authority conferred by said Act, the Commission in 1940 acquired an old toll bridge across the Mississippi River between the cities of Dubuque, Iowa, and East Dubuque, Illinois (R. 49-52, 73, 91-92), and is now constructing a new bridge (R. 54). The acquisition of the old bridge was deemed essential to the financing of the cost of the new bridge, as it was necessary to have the revenue from all traffic at this point available for the retirement of bonds. If the same were divided between competing bridges the revenue of the new bridge would be insufficient to retire bonds (R. 53, 54, 57, 58). When the new bridge is opened to public travel, the old bridge will be closed and dismantled as authorized by Congress (R. 48, 57, 58).

That portion of the old bridge located in Iowa was assessed for the year 1941 at a valuation of $107,500.00, less 5% per a general reduction, making a net assessed valuation of $102,225.00 (R. 29). The 1941 Iowa real estate consolidated levy in the City of Dubuque, Iowa, is 45.2 mills, making the 1941 taxes on said bridge in the sum of $4,620.57 (R. 29).

The Commission filed a complaint with the Board of Review for the City of Dubuque, Iowa, against said assessment, claiming that said bridge was exempt from taxation on the grounds (among others) that: (1) The Commission is a Federal Instrumentality and its property is, therefore, not subject to State taxation; and (2) said bridge is property of the United States and is exempt from taxation by Section 6944, Subparagraph 1, Code of Iowa, 1939, granting an exemption to "property of the United States" (R. 7).

The claim of immunity from taxation was denied by the Board of Review on June 12, 1941; (R. 9) an appeal was taken to the District Court of Iowa, in and for Dubuque County. The Board of Review denied the claim of the Commission and contended, as summarized in the opinion of the Supreme Court of Iowa, "that the Dubuque Bridge Commission was not entitled to exemption under the Act of Congress, and the fact that Congress failed to include the claim of exemption in the Bill is an indication that the property should be taxed" (R. 92) especially since a prior Act of Congress (75th) substantially the same as the one under which the Commission is acting, except that it contained an express exemption from all taxation, was vetoed by the President because of the inclusion therein of the tax exemption clause (R. 77, 78). Under date of January 29, 1942, said District Court adjudged and decreed that the bridge was not immune from State taxation (R. 80-82).

An appeal was taken to the Supreme Court of Iowa and that court on August 11, 1942, affirmed the District Court, holding that the bridge was not immune from the tax under the Constitution of the United States or the statute creating the Commission and that the bridge is not "property of the Unied States" and that, therefore, the bridge is not exempt under the Iowa statute which exempts "property of the United States" (R. 88-107).

Jurisdictional Statement.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States to review by Writ of Certiorari the judgment of the Supreme Court of Iowa is Section 237 (b) of the Judicial Code, as amended, United States Code Annotated Title 28, Section 344 (b), which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

The claim of immunity from the Iowa real estate tax as a Federal Instrumentality is a right, privilege or immunity claimed under the Constitution and a statute of the United States and under the authority exercised by petitioner by virtue of said statute. The immunity is implied under the Constitution of the United States, and the statute involved

is (Public No. 189—76th Congress, Chapter 318, 1st Session) (S 955) entitled "An Act Creating the City of Dubuque Bridge Commission, and authorizing said Commission and its successors to purchase and/or construct, maintain and operate a bridge or bridges across the Mississippi River at or near Dubuque, Iowa, and East Dubuque, Illinois", which was duly approved July 18, 1939 (R. 13) (Act of Congress July 18, 1939, Sections 1-15, 53 Statutes 1051-1057).

Cases which sustain the jurisdiction of the Supreme Court of the United States to review the judgment and decree of certiorari are *Graves, et al.*, v. *People of State of New York*, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939), certiorari granted 305 U. S. 592, 59 S. Ct. 252, — L. Ed. — (1938); *State Tax Commission of Utah* v. *Van Cott*, 306 U. S. 511, 59 S. Ct. 605, 83 L. Ed. 950 (1939), certiorari granted 305 U. S. 592, 59 S. Ct. 358, 83 L. Ed. 375 (1939); *Alabama* v. *King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. —, certiorari granted 314 U. S. 118, 62 S. Ct. 116, 86 L. Ed. — (1941).

The District Court of Iowa, in and for Dubuque County, was the court of first instance in this proceeding. In that court the federal questions involved herein were raised in the first pleadings filed therein, to wit: Statement of Appellant's claim by reference to "Exhibit A" attached thereto (R. 2, 4), and in certified copy of proceedings of Board of Review also attached thereto (R. 7); they were also raised by the Notice of Appeal from Board of Review served upon the chairman of the Board of Review (R. 10-12). In each of said instances the federal questions were raised by the following language:

> "4. The City of Dubuque Bridge Commission is a Federal Instrumentality and its property is, therefore, not subject to State taxation."

> "1. Said property is exempt from taxation under Section 6944, Subparagraph 1, Code of Iowa, 1939, as said property is in essence Federal * * * property within the meaning of said section."

The foregoing were set out in the findings of said District Court in its judgment and decree (R. 81) as being claimed by the Commission and were denied in said judgment and decree in the following language:

> "It is, therefore, adjudged and decreed by the Court, that the said bridge, located on the above described real estate, and owned by City of Dubuque Bridge Commission, is not immune from State taxation, under the facts and law in this case, and that the assessment herein complained of was a lawful and valid assessment, and that the appeal of said City of Dubuque Bridge Commission is hereby dismissed."

These claims were also made in the Supreme Court of Iowa (R. 91, 92), this being an equitable proceeding (Section 7134, Code of Iowa, 1939) triable de novo on appeal to that Court (Section 11433, Code of Iowa, 1939). The claim of immunity from taxation as a Federal Instrumentality involves a consideration of immunity from state taxation under the Constitution of the United States, and the same was fully presented to and considered and determined by the Supreme Court of Iowa (R. 95-104). The following quotations from the opinion of the Iowa Supreme Court shows that the federal questions sought to be reviewed herein, were raised, considered, and passed upon by that court:

> "Appellant argues as to the constitutionality of the act creating the City of Dubuque Bridge Commission as a constitutional exercise of Congressional power. Appellee, Board of Review, does not dispute in argument that the act creating the Commission and prescribing its powers is constitutional. We have no

doubt that this was a constitutional exercise of a power of Congress, but the conclusion drawn by appellant that Congress, having constitutionally created the corporation such as the one in question, has created a Federal instrumentality not subject to state tax, does not necessarily follow (R. 93-94).

"The opinion reviews McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed. 579, and various other cases, and holds that when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments.

"The trouble with the application of this case to the case at bar is that the Dubuque Bridge Commission is not a corporation which the United States owns and controls. The bridge is not a government-owned structure." (R. 95.)

"Under Division IV of appellant's argument it asserts generally that the bridge owned by the City of Dubuque Bridge Commission is immune from state taxation under the Constitution of the United States." (R. 95.)

"The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." (R. 96.)

"Appellant argues that this immunity arises out of necessity under the federal system." (R. 96.)

"In considering the foregoing case, assuming that the Bridge Commission acts as an agency of the government, it would further be necessary that through this agency, the United States exercises its governmental powers, a proposition which we do not think the facts in this case establish." (R. 96.)

"The second division of appellant's argument under this head is that property owned by a Federal instrumentality engaged exclusively in the exercise of gov-

ernment functions not for private profit, is not subject to state taxation. Cited under this head are United States *v.* Coghlan, D. C., 1919, 261 F. 425; United States Shipping Board Emergency Fleet Corporation, 9 Cir., 1922, 282 F. 950; United States Spruce Production Corporation *v.* Lincoln County, D. C., 1922, 285 F. 388; Clallam County *v.* United States, 1923, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328; City of New Brunswick *v.* United States, 1928, 276 U. S. 547, 48 S. Ct. 371, 72 L. Ed. 693, and the Graves case, supra. None of these cases can apply to or support the position of the appellant in the case at bar since all the property concerned in the litigation in each case, except the Graves case, consisted of property of the United States or of a corporation authorized by the United States and in which all the property was government owned." (R. 99.)

"The holding of the cases generally indicates that the rule is that such immunity not expressly granted must be shown to be an interference with or burden upon the Federal government, and as stated, we do not think such burden or interference exists in the present case." (R. 99-100.)

"We refer to this because we think that in the present case an interference or burden upon the Federal government and its operation does not appear and this seems to be the uniform rule, that there must be some such interference or burden to warrant the immunity from local or state taxation." (R. 100-101.)

"Appellant urges that Section 6944, Code of 1939, exempts the bridge from taxation as property of the United States. Appellant's assertion that the fact that the legal title is not in the name of United States of America does not disqualify the bridge from exemption may be granted. The mere name of the Federal instrumentality or agency, if its property were such, would not matter if it is actually Federal property, but the facts herein are that it is not such government property. We have previously discussed government instrumentalities and need not concern ourselves further therewith." (R. 104.)

"The history of the congressional legislation shows that the act was passed under circumstances not only not showing any intention or implication of exemption, but really showing the intention not to authorize such exemption from taxation." (R. 107.)

"We must conclude and hold that the decree of the district court should be sustained and the ruling and decree of the district court is therefore affirmed."

The final judgment sought to be reviewed is the decision of the Supreme Court of Iowa, the highest court in that state in which a decision could be had, which was filed and entered in the office of the Clerk of the Supreme Court of Iowa, on August 11, 1942, affirming the action of the trial court which denied the Commission's claim for immunity and exemption upon the Iowa real estate tax. The date upon which the application for Writ of Certiorari is presented is the 29th day of October, 1942.

The questions involved in this case are substantial, both from (a) a legal standpoint and (b) from a consideration of consequences of the denial of immunity from the state tax.

(a)

The decision of the Supreme Court of Iowa holds that the Commission, although constitutionally created by Congress in the lawful exercise of its governmental powers to accomplish a governmental purpose and that purpose only, nevertheless is not a Federal Instrumentality, does not exercise government powers, and that the property it uses to accomplish the governmental purpose is not immune from state taxation and is not property of the United States. The denial of constitutional immunity from state taxation in this case would, if allowed to stand, be a judicial repeal of constitutional immunity of Federal Instrumentalities from state taxation, except where expressly granted by Congress. Inasmuch as the United States is continually and ever-increasingly creating instrumentali-

ties to accomplish its governmental purposes, this question is of great importance.

This case also raises the question as to whether the tax immunity of governmental instrumentalities under the Constitution of the United States is to be denied because Congress in creating them was silent as to said immunity where a prior Congress granted immunity in an Act which was vetoed by the President of the United States because of said grant of immunity. The effect of congressional silence and legislative history on a doctrine which is implied in the Constitution presents a serious constitutional issue. The questions raised are substantial in their very essence.

(b)

The amount of the tax and the consequence of the denial of immunity therefrom are also substantial. The Iowa tax involved here is for the year 1941 in the sum of $4,620.57, based on a valuation of the old bridge at $102,225.00. This is an annual tax, always recurrent. The new bridge being built by the Commission will cost approximately $3,000,000.00 (R. 31, 43, 57). If the bridge is taxable in Iowa, it will also be taxable in Illinois. The Illinois rate of tax is about the same as the Iowa rate (R. 29). If the new bridge is taxed in both states at only 60% of $3,000,000.00, the annual tax on the present rates would be $75,600.00. In twenty years these taxes would total $1,512,000.00, and in thirty years, $2,368,000.00. An annual tax of $75,600.00 on the new bridge, plus annual interest charges, $105,000.00 (R. 58), plus annual operation and maintenance expense of $36,000.00 (R. 48), makes a total annual charge of $217,500.00, before any bonds could be retired. The gross income of the Commission for the year ending December 1, 1941, was only $188,163.00 (R. 73), and this was before tire and gasoline rationing. Moreover, the payment of the taxes will decrease the amount available for interest on

the bond issue and will prolong, if not make impossible, the accomplishment of the Congressional purpose, towit: the payment of the bonds and the making of the interstate bridge a toll-free structure.

Questions Presented.

The questions presented in this case are as follows:

1. Is the City of Dubuque Bridge Commission a Federal instrumentality?

2. Does the City of Dubuque Bridge Commission exercise governmental functions?

3. Is the City of Dubuque Bridge Commission immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from state taxation under the Constitution of the United States?

4. Is immunity from the Iowa real estate tax on the bridge of the City of Dubuque Bridge Commission to be denied because the first Act, passed by a prior Congress, undertaking to create the Commission was vetoed on account of a tax exemption clause therein, and the subsequent Act creating the Commission is silent as to tax immunity?

5. Is the bridge of the City of Dubuque Bridge Commission property of the United States?

Reasons Relied On for Allowance of the Writ.

1. As already pointed out, the federal questions presented are substantial, both from a legal standpoint and from the amount of tax involved and the subsequences of the denial of immunity from the state tax.

2. Petitioner contends that in holding that City of Dubuque Bridge Commission is not a Federal instrumentality, the Supreme Court of Iowa has decided a federal question of substance in a way probably not in accord with the

applicable decisions of the Court which cases it cites in the subjoined brief.

3. Petitioner contends that in holding that the City of Dubuque Bridge Commission does not exercise any governmental functions, the Supreme Court of Iowa has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court which cases it cites in the subjoined brief.

4. Petitioner contends that in holding that the City of Dubuque Bridge Commission is not immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from state taxation under the Constitution of the United States, the Supreme Court of Iowa has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court which cases are cited in the subjoined brief.

5. Petitioner contends that in holding that the bridge of the City of Dubuque Bridge Commission, a non-stock, non-profit corporation constitutionally created by Congress for a governmental purpose and that purpose only, and used exclusively to accomplish said purpose, is not constitutionally immune from the Iowa real estate tax, the Supreme Court of Iowa has decided a federal question of substance not theretofore determined by this Court.

6. Petitioner contends that in holding that the bridge of the City of Dubuque Bridge Commission is not immune from the Iowa real estate tax because the first Act, passed by a prior Congress, undertaking to create the Commission was vetoed on account of a tax exemption clause therein and the subsequent Act which actually created the Commission is silent with reference to taxation, the Supreme Court of Iowa decided a federal question of substance not theretofore determined by this Court.

7. Petitioner contends that by holding that the bridge of the City of Dubuque Bridge Commission is not property of the United States, the Supreme Court of Iowa has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court which cases it cites in the subjoined brief.

8. The denial of implied constitutional immunity from state taxation in this case would, if allowed to stand, be a judicial repeal of constitutional immunity of Federal instrumentalities from state taxation, thereby limiting the doctrine to departments of the Federal government or to cases where expressly granted by Congress.

9. This case involves the organic nature of a corporation created by the Congress of the United States, the determination of which will not only affect its liability for state taxes but also other rights dependent on the basic nature of this corporation.

WHEREFORE, your petitioner respectfully prays that Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Iowa, demanding that court to certify and send to this Supreme Court for its review and determination a full and complete transcript of the record and all proceedings of said Supreme Court had in the case numbered and entitled on its docket "No. 46015, In the Matter of the Appeal of City of Dubuque Bridge Commission from the Board of Review for the City of Dubuque, Julien Township, Dubuque County, Iowa," to the end that the decision and judgment of said Supreme Court may be reviewed and reversed by this Honorable Court and that judgment may be entered for this petitioner.

CITY OF DUBUQUE BRIDGE COMMISSION,
By E. MARSHALL THOMAS,
SMITH & O'CONNOR,
Its Attorneys.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 501

CITY OF DUBUQUE BRIDGE COMMISSION,
Petitioner,

vs.

THE BOARD OF REVIEW FOR THE CITY OF DUBUQUE, JULIEN TOWNSHIP, DUBUQUE COUNTY, IOWA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Iowa Supreme Court is reported in 5 N. W. (2) 334, and is found in the record (R. 88-107).

Jurisdictional Grounds.

The grounds of jurisdiction are adequately treated in Jurisdictional Statement in Petition for Writ of Certiorari, *supra*, page 4.

Statement of the Case.

The facts of this case are stated for the most part in the Petition for Writ of Certiorari and with the following additions will be sufficiently adequate:

The members of the Commission are named in the Act of Congress creating the same and vacancies thereon are to be filled by the Federal Works Administrator (R. 22, 23). Congress has reserved the right to alter, amend or repeal the Act (R. 27).

The Commission issued bonds in the sum of $475,000.00 which was used to acquire the old bridge (R. 53). Subsequently the Commission issued bonds in the sum of $2,800,000.00, bearing 3¾% interest, which retired the original bond issue and provided funds for constructing the new bridge (R. 56, 57, 58). Under the Act of Congress these bonds must be paid in thirty years (R. 16).

The State of Iowa is paying $408,000.00 plus some engineering expenses and the State of Illinois is paying $325,000.00 (combined State and Federal Highway Aid) toward the cost of the new bridge (R. 31, 41, 43).

The gross revenue from the bridge for the year ending December 1, 1941, was $188,163.00 (R. 73). The annual cost of operation, maintenance and repair, exclusive of taxes, is estimated by the Commission to be $36,000.00 (R. 56, 57).

The 1940 Illinois real estate consolidated levy in East Dubuque, Illinois, was 44½ mills (R. 29).

Assignment of Errors.

It is submitted that the Supreme Court of Iowa erred in holding:

1. That City of Dubuque Bridge Commission is not a Federal instrumentality.

2. That City of Dubuque Bridge Commission does not exercise governmental functions.

3. That City of Dubuque Bridge Commission is not immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from

state taxation under the Constitution of the United States.

4. That City of Dubuque Bridge Commission is not entitled to immunity from Iowa real estate tax because the first Act, passed by a prior Congress, undertaking to create the Commission, was vetoed on account of a tax exemption clause therein, and the Subsequent Act creating the Commission is silent as to tax immunity.

5. That the bridge of City of Dubuque Bridge Commission is not property of the United States.

ARGUMENT.

Points I and II—City of Dubuque Bridge Commission is a Federal instrumentality exercising governmental functions.

The Act of Congress creating City of Dubuque Bridge Commission is a constitutional exercise of governmental power. This is conceded by respondent and the Supreme Court of Iowa (R. 92) and is supported by a decision of the United States Supreme Court. *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 530; 14 S. Ct. 891, 38 L. Ed. 808 (1894). That case held that an Act of Congress which created a corporation and which authorized it to construct a bridge across the Hudson River between the States of New York and New Jersey, to issue bonds, and to secure the same by a mortgage on its property, and to collect tolls, was constitutional.

The Federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves* v. *People of State of New York*, 306 U. S. 466, 477; 59 S. Ct. 595, 596, 597; 83 L. Ed. 927 (1939); *Federal Land Bank* v. *Bismarck Lumber Co.*, — U. S. —; 62 S. Ct. 1, 5; — L. Ed. — (1941). When Congress constitutionally creates a corporation through which the Federal government lawfully

acts, the activities of such corporation are governmental. *Federal Land Bank* v. *Bismarck Lumber Co.*, supra; *Graves* v. *People of State of New York*, supra; *Pittman* v. *Home Owners Loan Corporation*, 308 U. S. 21, 32; 60 S. Ct. 15, 17; 84 L. Ed. 11 (1939). It, therefore, follows that City of Dubuque Bridge Commission, being constitutionally created, is a Federal instrumentality exercising the governmental functions of providing facilities for interstate commerce in the form of interstate highway bridges which shall be free of toll when their cost is paid.

The Supreme Court of Iowa is in error because it holds that the Commission does not exercise any governmental function (R. 96-97) and holds that the Federal government can lawfully act like the states both in a governmental and proprietary capacity (R. 101) *when in fact the national government can lawfully act only governmentally.* This error is basic and accounts for the Iowa Supreme Court's action in denying tax immunity.

Point III—The City of Dubuque Bridge Commission is immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from State taxation under the Constitution of the United States.

Chapters 330 to 349, inclusive, Code of Iowa 1939, as amended, provide for a system of taxing real and personal property in the State of Iowa. Section 6953 (1) of said Chapter 330 provides that toll bridges shall be taxed as real estate, and Section 6956 of said Chapter 331 provides that said property shall be listed by the owner; real estate taxes are a lien on the property assessed (Section 7202, Chapter 346); if the taxes are not paid, the property will be sold for taxes (Chapter 347). Section 7210, Chapter 346, provides as follows:

> "No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to at-

tend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

The Iowa Supreme Court has held that the tax is not in rem, but a debt, a personal obligation of the person taxed. *City of Dubuque* v. *Illinois Central Railroad,* 39 Iowa, 56, 61 (1874); *Findley* v. *Taylor,* 97 Iowa, 420, 422; 66 N. W. 744, 745 (1896). The tax in the case at bar is based on an assessment of a bridge as real estate, but the obligation to pay it is laid directly on the City of Dubuque Bridge Commission.

The Constitutional immunity of a Federal governmental agency from state taxation is implied in the United States Constitution, being a matter of necessity under the Federal system. *McCulloch* v. *Maryland,* 4 Wheaton 316; 4 L. Ed. 579 (1819); *Indian Motorcycle Company* v. *United States,* 283 U. S. 570, 575; 51 S. Ct. 601, 602, 603; 68 L. Ed. 328 (1923); *Clallam County, Washington,* v. *United States,* 263 U. S. 341, 342; 44 S. Ct. 121, 122; 68 L. Ed. 328 (1923). Its limits are set by the limits of lawful governmental operations. *Fox Film Corporation* v. *Dayal,* 286 U. S. 123, 128; 52 S. Ct. 546, 547; 76 L. Ed. 1010 (1932). The immunity applies to governmental corporations as well as to departments of government when the corporation exercises governmental functions. *Graves* v. *People State of New York, supra, Points I and II; Pittman* v. *Home Owners Loan Corporation, supra, Points I and II.*

The City of Dubuque Bridge Commission has constitutional immunity from the tax because it is a Federal instrumentality engaged exclusively in the exercise of governmental functions. The Commission does not and cannot engage in any operations for private profit. The decision

in the instant case should be controlled by the following cases: *Clallam County, Washington,* v. *United States, supra; City of New Brunswick* v. *United States,* 270 U. S. 547, 555; 48 S. Ct. 371, 372; 72 L. Ed. 693 (1928). For lower Federal Court decisions to same effect, see: *United States* v. *Coghlan,* 261 Fed. 425 (1919); *United States Shipping Board Emergency Fleet Corporation* v. *Delaware County, Pennsylvania,* 17 Federal (2) 40 (1927); *King County, Washington,* v. *United States Shipping Board Emergency Fleet Corporation,* 282 Fed. 950 (1922); *United States Spruce Production Corporation* v. *Lincoln County, Oregon,* 285 Fed. 388 (1922). In these cases real estate owned by corporations created by Congress to aid in the prosecution of World War of 1916-1918, was held to be immune from state taxation. The Iowa Supreme Court attempted to distinguish these cases on the basis that the corporations issued stock which was all purchased by the United States Treasury (R. 98-99). This is not a valid distinction because the difference is only in the method of financing. The war corporations were financed by sale of capital stock to the government, the Commission is financed by a bond issue and State and Federal Highway Aid. The important principle is that all were created by Congress to exercise governmental functions exclusively; the war corporations to prosecute the war, the Commission to provide interstate highway bridge or bridges free of toll when their cost is paid. The Commission is government owned as much as any non-stock, non-profit corporation can be owned by any person, for it is subject to Congressional power to alter, amend or repeal its authority. If it is not owned by the government, it is not owned by anyone. The decision of the Iowa Supreme Court is in error because it is contrary to the above cases.

The Commission is constitutionally immune from the tax because the legal incidence of the tax is laid directly on it,

a Federal instrumentality engaged exclusively in the exercise of governmental functions and the property assessed is a bridge which is the very means used to accomplish the governmental purpose.

The basis of the immunity has been stated to depend on whether or not the effect of the tax is to burden or interfere with governmental functions, *Railroad Company* v. *Peniston,* 18 Wall. 5, 36; 21 L. Ed. 787 (1873) being illustrative. The tax is a burden because the obligation to pay it is on the Commission, a Federal instrumentality. It is an interference with governmental functions because it prolongs, if not makes impossible, the accomplishment of the governmental purpose—an interstate highway bridge across the Mississippi River between Dubuque, Iowa, and East Dubuque, Illinois, free of toll as soon as the cost is paid. See petitioner's Application for Writ of Certiorari, *supra,* pages 10 and 11. Assuming the income of the Commission will be sufficient to retire the bonds and pay the tax and assuming that Iowa, its subdivisions or other interests, will not accept the Iowa portion of the new bridge on condition that it will be operated free of toll, who will pay this tax after the bonds are retired? The Commission will then have no income, for its right to collect tolls will cease and it will be charged with the duty of maintaining, operating and repairing the bridge (R. 21). To finance this maintenance, operation and repair will require an appropriation from Congress. *Shall the Commission then also ask Congress to appropriate an amount to pay the Iowa real estate tax?* The present tax is equally repugnant to constitutional principles.

The following cases also support petitioner's claim of tax immunity: *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516; 34 S. Ct. 354; 58 L. Ed. 706 (1914); *Weston* v. *City Council of Charleston,* 2 Peters 449 (1829); *Panhandle Oil Co.* v. *State of Miss.,* 277 U. S. 218; 48 S.

Ct. 451, 452; — L. Ed. 257 (1928); *Western Union Telegraph Co.* v. *Texas,* 105 U. S. 460; 26 L. Ed. 1067 (1881).

Point IV—City of Dubuque Bridge Commission is not deprived of immunity from Iowa real estate tax because of Congressional silence as to immunity after Presidential veto of expressed immunity.

The fact that the President vetoed an Act of the 75th Congress which undertook to create the Commission and to give it an expressed grant of the immunity, we believe is immaterial because the Commission is acting under an Act passed by the 76th Congress and approved by the President. Whether or not these circumstances show a waiver of implied constitutional immunity clearly raises a federal question.

There is no waiver of immunity by reason of Congressional silence. *Graves* v. *People of State of New York,* 306 U. S. 460; 59 S. Ct. 595, 598; 83 L. Ed. 927 (1939). Silence of Congress leaves the question of immunity to be determined as a constitutional question. *Graves* v. *People of State of New York, supra.* Petitioner believes the Supreme Court of Iowa erred in denying immunity because of Congressional silence following Presidential veto of immunity.

The veto was an expression of Presidential opinion, not Congressional. Congress intended immunity in the first Act and by remaining silent in the second it left the question open as a constitutional question, because it did not expressly consent to state taxation.

Congress had three alternatives: (1) to expressly grant immunity, (2) to expressly provide for state taxation, (3) or to be silent and leave the question of taxation by the state to be determined by judicial application of constitutional principles. If there had been only two alternatives, the rejection of one would be an intention of the other, but when there are three alternatives, to imply the adoption of one of two solely because of a rejection of the third, is

rash speculation. In this case, Congress is neutral as to immunity, and its existence or non-existence must be determined by constitutional principles.

In so far as Congress acted on this subject, its action is more consistent with granting the immunity if it exists under the Constitution than with denying it because of Congressional silence.

Point V—The Commission's bridge is property of the United States.

Section 6944 (1), Code of Iowa, 1939, exempts property "of the United States" from taxation. The Iowa Supreme Court conceded petitioner's "assertion that the fact that legal title is not in the name of United States of America does not disqualify the bridge from exemption may be granted" (R. 104). Supporting this proposition see *United States Spruce Corp.* v. *Lincoln County,* 285 Fed. 388, 391 (1922); *King County* v. *United States Shipping Board Emergency Fleet Corp.,* 282 Fed. 950, 953; *Commonwealth* v. *Newport & Covington Bridge Co.,* 32 Ky. L. 196; 105 S. W. 378, 379 (1907).

We do not ask the Supreme Court of the United States to construe the Iowa statute of exemption, for that is clearly in the exclusive province of the Iowa Supreme Court. We do ask this Court, however, to correct an erroneous conclusion as to United States constitutional law made by the Iowa Supreme Court which was used as a basis for construing the Iowa statute. *State Tax Commission of Utah* v. *Van Cott,* 306 U. S. 511, 514; 59 S. Ct. 605, 606; 83 L. Ed. 950 (1939); *Abie State Bank* v. *Bryon,* 282 U. S. 765, 773; 51 S. Ct. 252, 255; 75 L. Ed. 690 (1930).

It is apparent from the language of the Iowa Court that it held that the bridge was not property of the United States because it concluded the Commission was not a Federal instrumentality and did not exercise any governmental functions (R. 104-105). It also erroneously held that the Com-

Standard Oil Co. of Calif. v. Johnson, 62 Sup. Ct. 1168, 1169 (June 1, 1942)

mission was not a Federal instrumentality because it did not have capital stock owned by the United States Treasury (R. 99). For correction of these conclusions see Points I, II and III hereof.

The correction of these erroneous conceptions of Federal law will be very important if immunity should be denied because of Congressional silence which is discussed in Point IV, *supra.*

Summary of Argument.

I and II.

City of Dubuque Bridge Commission is a Federal instrumentality exercising governmental functions.

III.

The City of Dubuque Bridge Commission is immune from the Iowa real estate tax by virtue of the implied immunity of Federal instrumentalities from state taxation under the Constitution of the United States.

IV.

The City of Dubuque Bridge Commission is not deprived of immunity from Iowa real estate tax because of Congressional silence as to immunity after Presidential veto of expressed immunity.

V.

The Commission's bridge is property of the United States.

Respectfully submitted,

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(2840)

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NOV 21 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 501

CITY OF DUBUQUE BRIDGE COMMISSION,
Petitioner,

vs.

THE BOARD OF REVIEW FOR THE CITY OF DUBUQUE, JULIEN TOWNSHIP, DUBUQUE COUNTY, IOWA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN J. KINTZINGER,
City Solicitor of Dubuque, Iowa.
CHARLES S. RHYNE,
Counsel for Respondent.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

No question of due process is available to petitioner under the assignment of errors.

Petitioner's contention in the "Assignment of Errors" that the Supreme Court erred in certain respects does not in and of itself present a Federal Question under the due process clause of the Constitution.

Tracy v. *Genzberg,* 205 U. S. 170;
Bonner v. *Gorman,* 213 U. S. 86;
American Railway Express Co. v. *Kentucky,* 273 U. S. 269, 273;

Bell Telephone Co. of Pennsylvania v. *Pennsylvania Public Utility Commission,* 309 U. S. 30, 32.

I.

Answering Petitioner's Points I and II.

It does not necessarily follow that because of the mere fact that Congress created the Dubuque Bridge Corporation that it is exempt from State taxation.

When Petitioner states:

> "That the Supreme Court of Iowa erred in holding that City of Dubuque Bridge Commission is not a Federal Instrumentality" that Court did not so hold but stated (Pet. Brief p. 16):
>
> "We have no doubt that this was constitutional exercise of a power of Congress, but the conclusion drawn by Appellant that Congress having constitutionality created the Corporation such as the one in question, has created a Federal Instrumentality not subject to State taxation, does not necessarily follow" (R. 93-94).

No reference is made in regard to what respect the Bridge Commission exercises any governmental functions, but the only thing really complained of is that the State tax causes the postponement of the time when the bridge is to be paid for. Can it be urged because thereof that the economic burden of the tax is in some way passed on so as to impose a burden on the National Government tantamount to an interference by one government with the other in the performance of its functions? The theory of the case of *Graves* v. *People of New York,* 306 U. S. 466, is that there must be a substantial interference with the governmental power of the Federal government before such immunity is claimed in the absence of a grant of immunity by Congressional action.

II.

Answering Petitioner's Point III.

The principle of immunity does not extend to anything lying outside of or beyond Governmental functions and their exertion.

On page 21 of the Petition it is stated:

> "It is an interference with Governmental functions because it *prolongs,* if not makes impossible, the accomplishment of the governmental purpose, an interstate highway bridge across the Mississippi river between Dubuque, Iowa and East Dubuque, Illinois, free of toll as soon as the cost is paid."

That is the only reason asserted why they should be immune from state taxation. The question raised as to who will pay the taxes when the bridge is free is a matter for future determination.

The President, in his veto, stated:

> "The effect of this bill would be that, by declaring publicly-owned interstate highway bridges to be Federal instrumentalities, such bridges would thereby be exempt from all State and local taxation. I cannot give my approval to this bill, first, because I can find no compelling reason for making publicly-owned interstate highway bridges Federal instrumentalities, and secondly, because relieving such bridges of all State and local taxation would, in a majority of cases, result in loss of revenue by States and their political subdivisions, necessitating material curtailment of necessary activities, or the imposition of increased tax burdens upon other taxpayers to make up the deficit." (R. 78, 1-14.)

This bridge has been and can be continued to be operated by private enterprise. No governmental functions are connected therewith. Congress, after the Presidential veto,

passed the same Bill as the original Bill, eliminating therefrom the provision for tax exemption contained in the first Bill. The Bridge Commission is not a corporation which the United States owns and controls. The bridge is not a government-owned structure. The Bridge Commission receives no money from the United States Treasury, but receives its money solely from tolls (R. 25, 33-34; 26, 1-10).

The principle of immunity in the cases cited by Petitioner does not extend to anything lying outside of or beyond governmental functions and their exertion, and does not exist where no direct burden is laid upon the governmental instrumentality, and here there is only a remote, if any, influence upon the exercise of the functions of government.

The second group of cases cited by Appellant do not apply for the reason that under the facts in this case there is no substantial burden upon or interference with the governmental functions of the United States and the only effect of State taxation *would be the extension of the time of payment of the outstanding bonds issued by the Commission in the payment of the new bridge.* The holding of the cases generally indicates that the rule is that such immunity not expressly granted must be shown to be an interference with or burden upon the Federal government. Congress declined to pass legislation immunizing the Bridge from State taxation. There is no indication by Petitioner that the imposition of the tax in question upon the old bridge interferes with or puts a burden upon the operation or functions of the Federal government.

The tax here involved is on the old High Bridge which the Commission purchased and is now operating. When the new bridge is completed, the bridge in question will be dismantled. The old bridge will never become a free bridge.

A mere delay in the time when the bridge will become a free bridge cannot be said to be such an interference with

a government function as would authorize its immunity from taxation. This is no substantial or direct interference in any way with the operation of the Federal Government, but only the possible indirect postponement of final payment and is insufficient to grant the immunity.

Graves v. *People of State of New York*, 306 U. S. 466;
Helvering v. *Gerhardt*, 304 U. S. 405.

The cases cited by Petitioner are not applicable because the property concerned in each case, except the *Graves* case, consisted of property of the United States or of a corporation authorized by the United States and in which all the property was government owned.

The decision of the Supreme Court of Iowa is in accordance with the applicable decisions of this Court, and therefore, the claim of a Federal question is without substance.

It shows, therefore, that Petitioner's claim that there is a Federal question which should be reviewed by this Court is devoid of any substantial evidence of immunity and furnishes no basis for an Application for a Writ of Certiorari.

Consolidated Turnpike Company v. *Norfolk & C. Ry. Company*, 228 U. S. 596, 600;
Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, 311, 314.

III.

Answering Petitioner's Point IV.

From the history of this case, silence of Congress in the present Bill (immunity was in the first Bill) implied the State tax is to be paid.

The President vetoed the first Bill because it contained an express provision exempting the Bridge Commission and the bridge from all taxes. Thereafter Congress passed the identical Bill with no tax exemption provision therein.

Congress was fully acquainted with the facts then existing. Congress had no intention of declaring that the Bridge should be exempt from taxes either directly or by designating it a Federal Instrumentality.

The *Graves* case, in reviewing *McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316, "holds that when the National Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." In the present case we have a private corporation, not owned or controlled by the Government. The Bridge Commission, not the Government, controls and operates the bridge.

It is stated in the *Graves* case,

> "it is true that the silence of Congress when it has authority to speak may sometimes give rise to an implication as to the congressional purpose".
>
> "Silence of Congress implies immunity no more than does the silence of the Constitution."
>
> "The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to State Governments."

IV.

Answering Petitioner's Point V.

This is not a so-called Federal question, nor does it involve any right claimed under the Constitution of the United States.

V.

The decision of the Supreme Court of the State of Iowa is in accord with the applicable decisions of this Court.

This has been shown in Point II, *supra.*

VI.

Conclusion.

The petition should be denied.

Dated November 14, 1942.

Respectfully submitted,

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(3195)